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The legacy of UN Special Rapporteur Anaya on indigenous peoples and benefit-sharing

Posted on [May 29, 2014](#) by [Elisa Morgera](#)



by Elisa Morgera

May 2014: The UN Special Rapporteur on the Rights of Indigenous Peoples, James Anaya, has drawn unprecedented attention to the role of benefit-sharing in relation to indigenous peoples' rights to land and natural resources. On the [conclusion of Anaya's mandate](#) as UN Special Rapporteur, this blog post ties together the observations and recommendations on benefit-sharing that were scattered across the Special Rapporteur's reports and arranges them into three clusters: the rights of indigenous peoples, the duties of States, and the responsibility of business enterprises (particularly extractive industries). The blog post concludes by identifying outstanding questions and future venues for continuing this reflection.

Indigenous peoples' right to benefit-sharing

At the beginning of his mandate ([A/HRC/15/37](#), paras. 67 and 76-78), Anaya stated that "Aside from their entitlement to compensation for damages, indigenous peoples have *the right to share in the benefits* arising from activities taking place on their

traditional territories, especially in relation to natural resource exploitation” on the basis of the explicit reference to benefit-sharing in [ILO Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries](#) (Article 15.2) and implicit relevance to the [United Nations Declaration on the Rights of Indigenous Peoples](#) (Articles 25 and 26). He therefore explained indigenous peoples’ right to benefit-sharing as an implication of “the broad international recognition of the right to indigenous communal ownership, which includes recognition of rights relating to the use, administration and conservation of the natural resources existing in indigenous territories, independent of private or State ownership of those resources.” Anaya also emphasized in this connection that the only clear international standard applicable to benefit-sharing is that such sharing must be “fair and equitable” ([A/HRC/15/37](#), paras. 67 and 76-78).

Later in his mandate, however, Anaya preferred to refer to benefit-sharing as a “safeguard” for the realization of substantive human rights of indigenous peoples to their lands, territories and natural resources. Benefit-sharing was thus seen as one of a set of inter-linked safeguards together with consultation, free prior informed consent (FPIC), environmental and socio-cultural impact assessment, mitigation and compensation ([A/HRC/21/47](#), paras. 52 and 62). As to the relations among these safeguards, the Expert Mechanism on the Rights of Indigenous Peoples has highlighted that FPIC “establishes the framework for all consultations relating to the acceptance of projects that affect indigenous peoples and any related negotiations pertaining to benefit-sharing and mitigation measures” ([A/HRC/15/35](#), para. 34). The interplay between FPIC and benefit-sharing certainly appears worth of further investigation. The same conclusion applies when it comes to the distinction between benefit-sharing and compensation, which appears a difficult one to draw. Anaya stated that “Direct financial benefits – beyond incidental benefits like jobs or corporate charity – should accrue to indigenous peoples because of the *compensation* that is due to them” for allowing access to their territories, for giving up alternatives for the future development of their territories, and for suffering any adverse effects. Anaya also added, possibly pointing to the need to also take into account deep-rooted justice considerations, that benefit-sharing should compensate for the “significant social capital [indigenous peoples] contribute under the totality of historical and contemporary circumstances” ([A/HRC/24/41](#), para. 76).

In addition, Anaya emphasized that “benefit sharing must go *beyond restrictive approaches based solely on financial payments* which, depending on the specific circumstances, may not be adequate for the communities receiving them.” He referred to documented experience showing that monetary benefits to indigenous peoples may have negative (including divisive) effects on communities, and lead to the exercise of undue influence and even bribery. Accordingly, he recommended giving consideration to “the development of benefit-sharing mechanisms which genuinely strengthen the capacity of indigenous peoples to establish and follow up their development priorities and which help to make their own decision-making mechanisms and institutions more effective” ([A/HRC/15/37](#), para. 80). Anaya thus

encouraged indigenous peoples to use consultations with governments and other stakeholders as mechanisms to reach “agreements that are in keeping with their own priorities and strategies for development, bring them tangible benefits and, moreover, advance the enjoyment of their human rights” ([A/HRC/24/41](#), para. 59).

With regards to implementation, domestic laws guaranteeing benefit-sharing have been put in place by countries that are parties to the ILO Convention No. 169 ([ILO Guide](#) at 107-108). Nonetheless, Anaya pointed out, “Domestic law still presents serious limitations in this sphere.... Moreover, the share in project-generated benefits is often trivial in comparison with the company’s share, and there are often no clear and transparent criteria for apportioning such benefits” ([A/HRC/15/37](#), para. 78).

States’ duties to ensure benefit-sharing

Anaya also had the opportunity to discuss States’ obligations to ensure benefit-sharing in relation to States’ duty to consult with indigenous peoples: benefit-sharing was seen as one of the “elements of confidence-building conducive to consensus.” In this connection, he stated that States are responsible for holding consultation processes that should not only address measures to mitigate or compensate for adverse impacts of the project, but also explore and arrive at means of equitable benefit-sharing in a spirit of true partnership with indigenous peoples ([A/HRC/12/34](#), para. 53). It seems that here he considered benefit-sharing as a forward-looking approach to build a partnership between the government and indigenous peoples, that should be additional to and independent from compensation for negative impacts. However, as will appear below the point remains unclear.

Anaya focused on the role of benefit-sharing in three sets of circumstances when States’ obligations are particularly relevant: development programmes; conservation measures; and the control of extractive industries. In the course of his mandate, he paid particular attention to the last of these.

With regard to **development programmes**, such as the construction of dams and transportation facilities on indigenous peoples’ territories, Anaya cautioned that these initiatives, while generally considered to benefit the people of the State as a whole, may have negative effects on indigenous peoples. He argued that such negative impacts often arise from, inter alia, the absence of equitable sharing in the benefits of the development projects ([A/65/264](#), paras. 26-27). It seems that, in this instance, Anaya drew attention to the negative impacts arising from a lack of benefit-sharing, rather than to the fact that any benefits shared were insufficient to mitigate negative impacts. Unfortunately, there does not seem to be further discussion of this point in Anaya’s thematic reports.

In relation to the role of States in permitting **extractive activities**, Anaya recommended that the State must respect and protect the rights of indigenous peoples and ensure that the applicable safeguards are implemented through good-

faith efforts to consult with indigenous peoples and to develop and reach agreement on mitigation, compensation and benefit-sharing measures. He added that the adequacy of these measures and of the preceding consultations should be an important factor in ensuring that any limitation to indigenous peoples' rights is proportionate to the aim pursued through the extractive activities ([A/HRC/24/41](#), para. 38). Against this background, Anaya attempted to clarify the dividing line between the duties of States and the responsibilities of extractive companies themselves (discussed below). He noted concerns about States delegating their responsibilities to business enterprises, particularly when the national regulatory framework regarding indigenous rights, including in relation to benefit-sharing, is insufficient or inexistent ([A/66/288](#), para. 105). He thus emphasized that notwithstanding companies' efforts in ensuring due diligence, "the State remains ultimately responsible for any inadequacy in the consultation or negotiation procedures and therefore should employ measures to oversee and evaluate the procedures and their outcomes, and especially to mitigate against power imbalances between the companies and the indigenous peoples with which they negotiate" ([A/HRC/24/41](#), para. 62). He thus concluded that it is up to States to ensure the proper implementation of the benefit-sharing safeguard: States are to verify that agreements between indigenous peoples and extractive industries are crafted on the basis of full respect for indigenous peoples' rights and include provisions on impact mitigation, benefit-sharing and grievance mechanisms ([A/HRC/24/41](#), paras. 88 and 92).

Business responsibility to share benefits

Anaya's legacy in clarifying the role of benefit-sharing with respect to indigenous peoples' rights to their lands and natural resources may be considered particularly significant in outlining the responsibility of private business enterprises in that connection. In that sense, Anaya's reports have contributed to complement the [UN Framework on Business and Human Rights](#) and its [Guiding Principles](#), endorsed by the [UN Human Rights Council](#) in 2011. In effect, the UN Framework and its Guiding Principles made no reference to [benefit-sharing](#), and more generally did not make reference to the specific challenges faced in ensuring business responsibility for human rights such as those of indigenous peoples that are intrinsically linked to [environmental protection](#). Anaya's most important contribution can therefore be considered his clarification that benefit-sharing is part and parcel of business' due diligence – the process through which business enterprises identify, prevent, mitigate and account for their actual and potential adverse impacts on human rights, as part of business decision-making and risk management systems.

Anaya clarified that companies bear a responsibility to respect indigenous peoples' right to participate in decisions concerning activities potentially affecting their lands and resources, *independently* of States' duty to consult with indigenous peoples prior to the implementation of measures affecting them. And he emphasized that such corporate responsibility is "particularly important in connection with impact studies, compensation measures and benefit-sharing." That being said, Anaya recommended

that consultations carried out directly by private companies with indigenous peoples should be supervised by the State ([A/HRC/15/37](#), paras. 67).

Anaya further specified that in exercising their due diligence, companies must identify, prior to commencing their activities, all matters related to indigenous peoples' rights, recognize indigenous peoples' own social and political structures, as well as their possession and use of land and natural resources; and support government efforts in consulting indigenous peoples, conducting government-led environmental and socio-cultural impact studies, and agreeing on mitigation measures and benefit-sharing ([A/HRC/15/37](#), para. 46). He underscored in this connection that "benefit-sharing must be regarded as *a means of complying with a right*, and not as a charitable award or favour granted by the company in order to secure social support for the project or minimize potential conflicts" ([A/HRC/15/37](#), para. 79). Anaya also emphasized that the duty to share benefits is *independent of compensation measures*, although it "responds *in part to the concept of fair compensation* for deprivation or limitation of the rights of the communities concerned, in particular their right of communal ownership of lands, territories and natural resources" ([A/HRC/15/37](#), paras. 89 and 91). The relation or possibly (partial?) overlap between benefit-sharing and compensation emerges once again as a matter for further clarification.

Anaya, in addition, recommended that "direct negotiations between companies and indigenous peoples must meet essentially the same international standards governing States' consultations with indigenous peoples, including – but not limited to – those having to do with timing, information gathering and sharing about impacts and potential benefits, and indigenous participation." He also stressed that "Indigenous peoples should have full access to information about the technical and financial viability of proposed projects, and about potential financial benefits," and when this information is considered proprietary by companies, the latter should nonetheless share it with the indigenous peoples concerned, if necessary on a confidential basis. This was seen "as a necessary measure to mitigate power imbalances and build confidence on the part of indigenous peoples in the negotiations over projects, and because of equitable considerations relating to indigenous peoples' historical disadvantages and connections to project areas" ([A/HRC/24/41](#), paras. 62, 66, and 72).

In response to a questionnaire circulated by Anaya, business enterprises had noted the lack of a clear regulatory framework on benefit-sharing schemes ([A/HRC/18/35](#), para. 49). Anaya preliminarily recommended giving consideration to "the development of benefit-sharing mechanisms that genuinely strengthen the capacity of indigenous peoples to establish and pursue their own development priorities and that help indigenous peoples to make their own decision-making mechanisms and institutions more effective" ([A/66/288](#), para. 102). He therefore seems to point to the potential of benefit-sharing to act as a tool to build partnerships not only between

governments and indigenous peoples, but also between private companies and indigenous peoples.

Anaya then turned to the study of specific modalities for building long-term, sustainable relationships between business enterprises operating extractive projects and indigenous peoples. He underscored the need to go beyond the usual model of natural resource extraction, whereby the initial plans for exploration and extraction of natural resources are developed by the corporation, with some involvement by the State, but little or no involvement of the affected indigenous community, with the result that indigenous peoples are “at best being offered benefits in the form of jobs or community development projects that typically pale in economic value in comparison to the profits gained by the corporation” ([A/HRC/21/47](#), paras. 68, 74 and 76).

Against this background, Anaya concluded that the preferred model is “one in which indigenous peoples themselves initiate and engage in resource extraction.” If extractive projects are to be carried out by outside companies or the State, a model preferable to the usual one is rather based on an agreement to fully protect the rights of indigenous peoples and make them genuine partners, by allowing them (for instance, through a minority ownership interest in the extractive operations) to participate in project decision-making *and* share in its profits ([A/HRC/24/41](#), para. 75). This points to the usefulness of benefit-sharing arrangements that at the same time provide enhanced participation opportunities and income generation for indigenous peoples.

Outlook

Taken together, the observations and recommendations formulated by the UN Special Rapporteur on the Rights of Indigenous Peoples, James Anaya, have certainly advanced understanding of the promising role of benefit-sharing in relation to indigenous peoples’ rights to lands, territories and natural resources. The previous Rapporteur had only mentioned the concept once ([E/CN.4/2003/90](#), para. 66), although that reference to benefit-sharing has proven quite influential on the Inter-American Court of Human Rights in its landmark [Saramaka case](#).

Anaya’s work, however, has led to the identification of a series of outstanding questions in relation to the role and conditions under which benefit-sharing may best support the respect, protection and full realization of indigenous peoples’ rights to lands and natural resources. It can thus be expected that other international processes may pick up on some of the areas that need further clarification identified above. This may be the case of [further studies on the impacts of extractive industries and green energy projects](#) on indigenous peoples’ rights to lands and natural resources. It may further occur through the [collection of good practices](#) by the UN Independent Expert on Environment and Human Rights who has pointed to States’

duty to ensure benefit-sharing from extractive activities in indigenous peoples' land and territories ([A-HRC-22-43](#), para. 41; [A/HRC/25/53](#), para. 78).

Meanwhile, the [BENELEX project](#) will investigate the interplay between free, prior informed consent and benefit-sharing, environmental and socio-cultural impact assessment and benefit-sharing, as well as compensation and benefit-sharing, in particular exploring points of contact and tension with international biodiversity law.

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